IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1823

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY DON SHANNON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(CA-3-91-789(3:86-CR-374-T))

(September 1, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Gary Don Shannon ("Shannon") appeals from the district court's denial of § 2255 relief and dismissal of his petition. Concluding that further consideration is warranted with respect to Shannon's allegations of ineffective assistance of counsel for

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

failure to file a notice of appeal, we affirm in part and vacate and remand in part.

I.

On March 2, 1987, Shannon pleaded guilty, pursuant to a written plea agreement, to Count II of a twenty-five count superseding indictment, which charged him inter alia with engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848. He also pleaded guilty, pursuant to the same plea agreement, to both counts of an information which charged him with income tax evasion, in violation of 26 U.S.C. § 7201, and with being a felon in receipt of firearms obtained through interstate commerce, in violation of 18 U.S.C. § 922(h)(1).

The plea agreement specified that an appropriate disposition of the case would be a prison sentence of thirty-five years or less, to be determined by the court. Shannon was sentenced to a twenty-year term of incarceration on the CCE count and a five-year term each on the tax evasion and firearms charges, with all sentences to run consecutively. Shannon's notice of appeal was not timely filed.

Four years later, Shannon filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255, alleging double jeopardy, ineffective assistance of counsel, and improper inducement in his guilty plea. The district court denied § 2255 relief and dismissed Shannon's petition. Shannon filed a timely notice of appeal.

We affirmed the dismissal of Shannon's § 2255 motion in part, remanding only that part of the motion that alleged ineffective assistance of counsel for failure to file a notice of appeal and failure to file a motion for correction or reduction of sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. Upon remand, and after an evidentiary hearing, the magistrate again recommended dismissal. Shannon filed objections to the recommendation, but the district court overruled them when it adopted the magistrate's report and dismissed the remanded matter. Judgment was entered accordingly, and Shannon again appealed.

II.

Although a district court's ultimate finding on an ineffective assistance of counsel claim is a mixed finding of law and fact, subsidiary findings on purely factual issues are reviewed under the clearly erroneous standard. United States v. Rusmisel, 716 F.2d 301, 304 (5th Cir. 1983). A finding of fact is clearly erroneous when, although there is enough evidence to support it, the reviewing court is left with a firm and definite conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Henderson v. Belknap (in re Henderson), 18 F.3d 1305, 1307 (5th Cir. 1994). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that, had it been

sitting as the trier of fact, it would have weighed the evidence differently. Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

III.

Shannon alleges that the district court erred in finding that 1) his attorney, L.C. Taylor ("Taylor"), was not ineffective for failing to file a notice of appeal, and 2) Shannon's plea of guilty was knowing and voluntarily made. In reaching the first conclusion, the district court made the factual findings that Taylor advised Shannon of his appellate rights and that Shannon waived his right to appeal by letting the matter rest.

The district court found that Shannon was informed of his right to appeal his conviction by Taylor, and that Shannon never requested that Taylor file a notice of appeal. The district court did not make a specific finding regarding whether Shannon was informed of his right to appeal in a timely fashion. Shannon contends that such a failure renders clearly erroneous the district court's general finding that he was informed of his right to appeal. He may be correct.

Waiver of the right to an appeal merely "requires that there be knowledge of the right to appeal and a failure to make known the desire to exercise that right." United States v. Gipson, 985 F.2d 212, 216 (5th Cir. 1993); Meeks v. Cabana, 845 F.2d 1319, 1322 (5th Cir. 1988) (§ 2254 case). However, the Constitution requires that a defendant be fully informed of his right to

appeal, and that he be advised "not only of his right to appeal, but also of the procedure and time limits involved and of his right to appointed counsel on appeal." Childs v. Collins, 995 F.2d 67, 69 (5th Cir.), cert. denied, 114 S. Ct. 613 (1993) (§ 2254 case).

Taylor testified that he "discussed [with Shannon] that he had a right to an appeal." The record does not indicate, however, when exactly this discussion transpired. Taylor testified that he didn't talk about Shannon's right to appeal when he discussed a "time cut" with Shannon immediately after the sentencing hearing. It appears that the discussion occurred at the same time Taylor discussed the Rule 35 request, "some time, maybe . . . a month or so" after sentencing. And even at that time, Taylor did not fully inform Shannon of his rights. Taylor testified that he himself did not know the time limits for filing an appeal, and that he had not informed Shannon about the time limit for filing an appeal or the actual process because he thought the district court had "admonished [Shannon] as to his right of appeal when he was doing a plea in Court." The court, however, had not admonished Shannon on that issue.

Shannon testified that he asked Taylor to file an appeal "immediately" after sentencing. Shannon's wife testified that she discussed an appeal with Taylor "approximately two weeks after [Shannon's] sentencing," and that Taylor informed her that "he was going to file it." Taylor, however, testified that he never told Shannon that he (Taylor) would file a notice of appeal

for him, and that he "didn't know if anyone ever asked [him] to appeal."

Assuming, as the district court did, that Taylor's testimony is credible, by his own admission, he was unaware of the time limits for filing an appeal, and most likely he did not discuss an appeal until a month after sentencing. In light of Gipson and Childs, Shannon may not have been properly, or timely, informed of his right to appeal. Thus, the district court's finding that he waived that right may be clearly erroneous. Remand is appropriate with regard to this issue so that the district court may enter findings of fact and conclusions of law and conduct an evidentiary hearing if one is warranted.

IV.

In his initial § 2255 motion, Shannon alleged that his attorney was ineffective for failing to file a Rule 35 motion. The district court, on remand, found that although Taylor's actions in this regard came "close to demonstrating objectively unreasonable conduct," Shannon had not shown Strickland prejudice. Shannon does not brief this issue on appeal, and thus it is deemed abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

V.

Shannon also alleges that his guilty plea was induced by Taylor's promise that Shannon would receive no more than a 60- to

72-month sentence. We rejected this basis of relief on appeal, and the magistrate judge had no warrant, under our prior mandate, to reopen this issue. The paragraph in the magistrate judge's findings, conclusions and recommendation (adopted by the district court) concerning this issue is vacated.

VI.

For the foregoing reasons, we AFFIRM in part, VACATE in part, and REMAND to the district court for further proceedings consistent with this opinion.